

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

LOBBY CONFERENCE - SEALED

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Thursday, December 18, 2014
11:01 a.m.

Marcia G. Patrisso, RMR, CRR
Official Court Reporter
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 3510
Boston, Massachusetts 02210
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Mechanical Steno - Computer-Aided Transcript

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P R O C E E D I N G S

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3 THE COURT: Just a couple of very quick things about
4 jury selection that I didn't want to say in public. One is
5 that I would like to schedule a more serious session for the
6 finalization of the procedures and the questionnaires and so on
7 and so forth, and what we've been looking at is the 30th,
8 Tuesday the 30th, in the morning.

9 Does that work for everybody?

10 MR. WEINREB: That's fine.

11 THE COURT: Okay. So we'll do that in camera,
12 probably here.

13 MS. CLARKE: The holiday is sort of over for us
14 already.

15 THE COURT: Before it began?

16 MS. CLARKE: Yes.

17 | THE COURT: Well, you enjoyed Thanksgiving.

18 MS. CLARKE: Yes.

19 Did you set a time, Judge?

THE COURT: I did

midmorning, just to let everybody attend to the first orders of business. We'll probably do it in this room. I didn't want to announce it publicly because I didn't want people dogging you as you came in or left.

25 I haven't finalized all of this in my own mind. My

1 inclination is to replicate the successful, and that would be
2 the *Bulger* method that Judge Casper used which essentially kept
3 media and most other observers out of the courtroom for the
4 individual voir dire, so that it was one-on-one with
5 broadcasting, or whatever you'd call it, to the other rooms,
6 but no audience in the courtroom. And I think that inhibits
7 candid discussion with the jurors, to have them stared at while
8 they answer their questions.

9 My understanding is, on the defense request in the
10 *Bulger* case, there were a minimal number of members of the
11 public in the courtroom to overcome any objection that it was
12 not a public proceeding. I'm not sure why physical presence as
13 opposed to video and audio access makes a difference, but the
14 law of the circuit is uncertain on this, and it seems to be
15 developing, if we could call it that, and so I think that it
16 may be prudent to do that. And maybe you could discuss how we
17 do that without anybody making an objection to how we've done
18 it. But I think it will -- so that's -- but that's so much a
19 general idea at this point.

20 The only other thing was 18 U.S. Code 3432 which calls
21 for the service on the defendant of the list of the witnesses
22 and venire three days before the commencement of trial. I
23 guess "trial" means the process of selecting the jury, so that
24 would be the 5th, so I think three business days was your
25 conclusion, so I think it pushes it to Monday, the 29th.

1 There are just a couple of issues. We would
2 interpret -- it uses the term "veniremen." "A copy of the
3 indictment and a list of the veniremen and of the witness list
4 to be produced on the trial." The veniremen, I would think,
5 would be the 1,200, not the original 3,000, but the net number
6 of that. If there's no objection, we'll proceed on that
7 assumption and we'll get that.

8 The other question is the statute requires the name
9 and, quote, place of abode, which is undefined. There's been,
10 apparently, varying practice about this. My preference would
11 be to give town only and not street address for the venire. I
12 don't know why a street address for prospective jurors is
13 necessary. There is that issue. If you want to think about
14 it, it's an issue.

15 I don't know that there's any -- I don't think there's
16 any controlling guidance from what we've been able to
17 determine. As I say, there may be different practices. A
18 possible alternative is to use ZIP code. So, for example, it
19 gives you a little more specificity for the City of Boston if
20 you know the ZIP code rather than just the town. So that may
21 be of some -- but I don't see any legitimate reason why you
22 need to know exactly where the juror lives.

23 Witnesses could be a different thing. It raises the
24 question of -- I know the government's witness list, the law
25 enforcement people are identified by agency rather than home

1 address. That seems like a reasonable thing to do, but if
2 there's anything you want to raise about that, we should
3 confront that as well.

4 So basically, those are the questions I have under the
5 statute which we need to answer. And, again, we can do that on
6 the 30th when we -- no, we can't. We have to -- I'm sorry. I
7 keep forgetting because the day before we have to give the
8 list. So give it some thought and maybe you could report back
9 that you have an agreement or disagreement and we could resolve
10 that, okay?

11 MS. CONRAD: Judge, can I ask you a question about
12 what, if any, arrangements are being made for parking for the
13 jurors.

14 THE COURT: The jurors -- okay. I can tell you that
15 much. We will be entering a possible sequestration order,
16 which is what they call it, which puts the jury in the custody
17 of the marshals. They will meet at a remote location and be
18 brought to the courthouse in a van, or two vans, I think, so
19 they can come into the courthouse without having to go through
20 the general front entrance. So they'll park wherever that is.

21 MR. BRUCK: This is the venire? Or is this for voir
22 dire, the actual trial --

23 THE COURT: No, this is the trial jury.

24 MS. CONRAD: What about for the venire?

25 THE COURT: That's -- I guess that's their problem, as

1 it is for everybody now, you know? Any jury that we have,
2 they're going to have a problem.

3 MS. CONRAD: Just in terms of the numbers, I was
4 thinking.

5 THE COURT: Well, you know, I don't think it's -- the
6 way we're going to do it, 200, 200, 200, 200, it's kind of like
7 a normal Monday. It's a pain, but I guess you just have to
8 hunt around.

9 MS. CLARKE: Judge, on the marshals and the remote
10 location, my understanding is that many of the victims also
11 meet at a remote location and are shuttled in.

12 THE COURT: Unrelated. We're not getting involved
13 with the victims. That's all --

14 MS. CLARKE: But there's no connection? I mean, no --

15 THE COURT: I'll ask that question. I'm pretty sure
16 it's not the same, but I will ask that question. I mean, part
17 of our point is to keep those people separate.

18 MS. CLARKE: Right.

19 THE COURT: That's part of the reason not to have the
20 jury -- the jurors will also have their lunch brought in here
21 so they won't go to cafeteria and so on, and then they'll get
22 whisked away at night for the same thing. But part of the
23 point is to keep, from our point, the jurors away from
24 witnesses, victims, everybody else.

25 MS. CLARKE: I understand. I just wanted to raise

1 that just in case --

2 THE COURT: I'll double-check that, but I'm pretty
3 sure they are not the same at all.

4 MS. CLARKE: The other question, the 200, 200, 200,
5 200, that process, is that the order in which they will be
6 called into the courtroom for voir dire? Say, the first 200
7 come and that's Numbers 1 through 200. Is that the same
8 order --

9 THE COURT: Yeah, I think we'll proceed in sequence.
10 They'll be assigned a number --

11 MS. CLARKE: At that point randomly assigned a
12 number --

13 THE COURT: Yes. I don't know the details, again,
14 we're going to replicate what *Bulger* did, but the first 200
15 will fill out their questionnaires, we'll take all the
16 questionnaires, they -- I think the juror number in the *Bulger*
17 case was handwritten on every page so that if they came apart,
18 page 17 went with this juror.

19 MS. CLARKE: Sure.

20 THE COURT: And then I guess they're in -- they're
21 probably in sequence -- I imagine they produce a list, just
22 like in a regular simple trial where you come into the
23 courtroom and they have the list of 1 through 45, who the
24 jurors are. I assume they'll go 1 through 1,200 or whatever.

25 MS. CONRAD: Will that correlate -- when we get the

1 list of the venire next week, will the --

2 THE COURT: I would guess so. We can double-check
3 that, but I would guess so.

4 MR. WEINREB: It would be useful to know if the
5 Court's decided yet when we can expect to get the juror
6 questionnaires, whether we'll be getting them every night or --

7 THE COURT: Oh, I see. That's something we'll work
8 out on the 30th. Grossly, something like that.

9 MR. WEINREB: And then more --

10 THE COURT: You'll get them as they're produced.

11 MR. WEINREB: More to the point, how long we'll have
12 to review them because --

13 THE COURT: That's something we have to work out.

14 MR. WEINREB: We may need to --

15 THE COURT: It won't be overnight. It will be more
16 than overnight.

17 MR. WEINREB: I'm grateful to hear that, but how many
18 people we need to make accommodations for to help us look at
19 them may depend on how much time we have to look at them and
20 what kind of --

21 THE COURT: I think our gross -- again, our
22 sketch-out, was the Monday people we might be addressing on
23 Thursday. So you'd have a couple of days for -- so that would
24 be -- that would move through, I think. So the Tuesday people
25 would be Friday and then the Wednesday people will be the

1 following Monday. So we wouldn't actually begin individual
2 voir dire until early or mid second week.

3 MR. WEINREB: I see. Second week. Okay.

4 THE COURT: So for the third group, you have all
5 weekend.

6 MR. MELLIN: Thank you, your Honor.

7 MR. WEINREB: Now I'm confused. When you say the
8 second week, will we have --

9 THE COURT: So --

10 MR. WEINREB: So we'll be done by Wednesday with the
11 questionnaires?

12 THE COURT: We'll have 200, 200, 200, 200. How many
13 is that? That's 400 per day. Yes, 1,200.

14 MR. WEINREB: So the question is: The Thursday you're
15 referring to, is that the very next Thursday or a week from
16 Thursday.

17 THE COURT: No, that Thursday for Monday.

18 MS. CLARKE: Monday's your -- January 5th, 400 people
19 we will be seeing again on Thursday.

20 THE COURT: So the 6th, 7th, 8th. So on January the
21 8th you'll be considering -- we'll be considering --

22 MS. CLARKE: We'll all meet and say we agree to excuse
23 the following?

24 THE COURT: Again, the details in *Bulger*, there was a
25 deadline for the parties to submit their joint agreement on

1 excusals, and as I understand it, Judge Casper took the
2 agreement, didn't reevaluate it. And I don't really see any
3 reason to do otherwise if you both --

4 MS. CLARKE: So you're envisioning what Thursday's
5 activity is our submission of our joint agreement or --

6 THE COURT: And then to the extent have you disparate
7 views on people, we can talk about them and reduce that. And
8 then similarly the next day, Friday, we would do the Tuesday
9 group and get them reduced. So you've got 400 on Monday, you
10 reduce it to 75 as a result of the -- so on. And then -- and
11 so by the end of the three-day process, Thursday, Friday,
12 Monday, we'd know who the people who will be subject to
13 individual voir dire will be and we can begin that process.
14 Whether that begins the next day or we skip a day to build
15 in --

16 MS. CLARKE: And will they maintain that same order
17 that they're left standing in?

18 THE COURT: Yes. Yeah.

19 MR. CHAKRAVARTY: In *Bulger*, were they able to get
20 through 200 a day?

21 THE COURT: They went faster than they thought. We're
22 going to -- I don't know. That's something we're going to
23 maybe refine. I think there was a disagreement on the papers
24 whether we call them in by 25s or 50s. I don't -- you know,
25 either one is a guess, in a sense. And it's adjustable. I

1 mean, if you brought in 25 and you sort of ran out of people at
2 the end of the day, you could bring in more the next day.

3 So I think on this, it's probably -- we will probably
4 get a jury by the third week sometime, before the end of the
5 third week. Whether it's early in that week or not, I don't
6 know. Maybe, if we're lucky, by the end of the second week,
7 but that's sort of the range.

8 MR. WEINREB: So just if I could, your Honor, to
9 return to something you said in the very beginning about having
10 a minimal presence in there when we're doing the individual
11 voir dire. So does that contemplate that there will be a
12 portion of voir dire where there's a single potential juror --

13 THE COURT: Yes.

14 MR. WEINREB: -- being questioned?

15 THE COURT: Yes.

16 MR. WEINREB: But it will be in open court; it won't
17 be under the husher or in the back?

18 THE COURT: So what I understand what Judge Casper
19 did, she had a session in her courtroom, in the well of the
20 courtroom. She sat at a table like this. And actually the
21 individual juror sat here, Judge Casper was there, the reporter
22 was there, counsel were further down, and the defendant, and
23 the judge and the juror had a conversation.

24 It was videoed and audioed generally to the other
25 rooms. If the juror had a particular sensitive issue that in

1 simpler times we would have done at sidebar, they shut the
2 audio off. The cameras were positioned so that you could see
3 the juror probably come in and sit down, but the camera was
4 being shot over the juror's head, at Judge Casper. But there
5 was a facility to kill the audio if the juror had something
6 particularly --

7 MS. CONRAD: But if there was someone public in the
8 courtroom?

9 THE COURT: I don't know what they did with that.
10 That's a question we'll have to answer, whether they excuse
11 them briefly or --

12 MR. WEINREB: I'm sorry to interrupt.

13 Were members of the press in the courtroom?

14 THE COURT: No. They were in the other rooms.

15 MR. WEINREB: Right.

16 MR. CHAKRAVARTY: Were the jurors told about the
17 arrangements?

18 THE COURT: I don't know that detail.

19 Okay? So I guess to recap, if we could know by, say,
20 Monday or so what your views are on the statute and what the
21 meaning of the statutory terms are so we could prepare the list
22 for service. It doesn't say who serves them. Is it the
23 government who serves them or do we?

24 MR. WEINREB: Well, when the veniremen, I assume it's
25 the Court. The witness list, it would be the government.

1 THE COURT: So this, interestingly, is another -- I
2 don't know how old this statute is. It has archaic-sounding
3 language.

4 MR. BRUCK: 1790. It was signed by George Washington.
5 April 30th.

6 THE COURT: Because it says, "The witnesses to be
7 produced on the trial for proving the indictment." It sounds
8 like it's only the government witnesses, which I guess makes
9 sense.

10 MR. BRUCK: Right.

11 THE COURT: But at any rate, the terms are a little
12 obscure.

13 MR. BRUCK: It was the tail-end of the first crime
14 bill that created federal crimes. And just as today, there
15 were a couple of procedural things tacked onto the end.

16 MS. CLARKE: You could see that the code has grown
17 since then.

18 THE COURT: Yes. Anyway, so if -- and, you know, kind
19 of report back where we are on those issues on Monday and we
20 can adjust it, okay?

21 MR. BRUCK: Okay. Thank you.

22 COUNSEL IN UNISON: Thank you, your Honor.

23 THE COURT: Thank you all.

24 (The proceedings adjourned at 11:17 a.m.)

25

1 C E R T I F I C A T E
23 I, Marcia G. Patrisso, RMR, CRR, Official Reporter of
4 the United States District Court, do hereby certify that the
5 foregoing transcript constitutes, to the best of my skill and
6 ability, a true and accurate transcription of my stenotype
7 notes taken in the matter of Criminal Action No. 13-10200-GAO,
8 United States of America v. Dzhokhar A. Tsarnaev.
910 /s/ Marcia G. Patrisso.
11 MARCIA G. PATRISSO, RMR, CRR
Official Court Reporter
1213 Date: 5/10/16
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